No. 82-2026

In the
Supreme Court of the United States

October Term, 1982

Joseph H. Weston — *Petitioner*

V.

Ann Bachman; Nancy Brokaw; Jean Hill; Jackie Hall; John Norman Harkey; Circuit Judge Andrew G. Ponder; Leroy Blankenship; Attorney; Circuit Judge H.A. Taylor; Robert Dudley, Associate Justice of Arkansas Supreme Court; Veda M. Gordon, Foreman of Grand Jury; R. Ford Wilkinson; Dr. Robert McChesney; Dr. J. Lynn Mellor; Independence County; Attorney General Steve Clark, as respondent to suits against Arkansas; Conley Byrd; George Smith; Frank Holt; Darrell Hickman; Stephen A. Matthews; Richard H. Wootton; Richard A. Cobb; State of Arkansas; Little Rock, Arkansas Stake of Church of Jesus Christ of Latter Day Saints; John I. Purtle; Richard Mays; and John Stroud — *Respondents*

ON PETITION FOR WRIT OF CERTIORARI

RESPONDENTS' BRIEF FOR R. FORD WILKINSON; DR. ROBERT McCHESNEY; DR. J. LYNN MELLOR; RICHARD W. COBB; and LITTLE ROCK, ARKANSAS STAKE OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ERRED IN HOLDING a) THAT NO ARKANSAS SAVINGS STATUTE IS APPLICABLE TO PETITIONER WESTON'S ACTION IN THE CIRCUMSTANCES PRESENTED IN THIS CASE; b) THAT UNDER ARKANSAS LAW, THE STATUTE OF LIMITATIONS IS NOT TOLLED BY FILING OF A MOTION TO PROCEED *in forma pauperis;* and c) THAT EQUITABLE CONSIDERATIONS DO NOT REQUIRE THE PAID FILING TO BE RELATED BACK TO THE INITIAL *in forma pauperis* FILING FOR STATUTE OF LIMITATIONS PURPOSES.

II. WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT WESTON FAILED TO ALLEGE THAT HIS CONSTITUTIONAL RIGHTS WERE VIOLATED WITH RESPECT TO CHURCH RESPONDENTS.

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OPINIONS BELOW

On November 10, 1980, the Honorable William R. Overton of the United States District Court, Eastern District of Arkansas, Western Division, denied Petitioner Weston's "Request for Permission to file in Forma Pauperis." (p. 1, Appendix) *Weston v. Bachman*, No.

LRM380 (D. Ark. Nov. 10, 1980) (Order denying petition to file *in forma pauperis*).

The next order entered was on September 30, 1980, when Judge Overton granted the various motions to dismiss (p. A-2, Appendix) based on lack of subject-matter jurisdiction and because of statute of limitations problems. *Weston v. Bachman*, No. BC81-45 (D. Ark. Sept. 30, 1981) (Order granted defendants motion to dismiss).

On July 7, 1982, the Eighth Circuit Court of Appeals remanded the case to the District Court to reconsider the filing of the motion *in forma pauperis* with respect to its previous decision on the statute of limitations (p. A-4 Appendix) *Weston v. Bachman*, No. BC81-45 (D. Ark. Nov. 2, 1982) (Order remanding the prior ruling that case should be dismissed on statute of limitations grounds).

On March 15, 1983, the Eighth Circuit Court of Appeals affirmed the District Court opinion of November 2, 1982, (p. A-13, Appendix) *Weston v. Bachman*, No. 81-2112, 82-2433 (8th Cir. March 15, 1982) (*aff'd* E.D. Ark.)

The Eighth Circuit Court of Appeals denied the petition for rehearing on April 8, 1983, (p. A-15, Appendix) *Weston v. Bachman*, No. 81-2112 & 82-2433 (8th Cir. April 8, 1983) (denied petition for rehearing).

On May 3, 1983, Weston's motion to stay mandate was denied by the Eighth Circuit Court of Appeals (p. A-16 Appendix) *Weston v. Bachman*, No. 81-2112 & 82-2433 (8th Cir. May 3, 1983) (denied Motion to stay mandate pending petition for Writ of Certiorari).

JURISDICTION

Petitioner correctly cites 28 U.S.C. §1254(1) as the basis for jurisdiction of his petition which provides:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

However, according to Rule 17 of the Supreme Court Rules, "a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore . . . " 28 U.S.C. Supreme Court Rule 17.

This is not a case for such review. Petitioner Weston brought this action alleging violations of his civil rights apparently pursuant to 42 U.S.C. §§1983, 1985, and 1986. In the District Court opinion of September 30, 1981, The Honorable William Overton granted the defendants' various motions to dismiss the case on the grounds that Weston had failed to toll the statute of limitations within the requisite period and that none of the allegations made by Weston were sufficient to show that his constitutional rights were violated. In addition, Judge Overton held that these respondents (namely Wilkinson, McChesney, Mellor, Cobb, and the Mormon Church – hereinafter referred to as Church Respondents) were not even acting under color of state law, one of the prerequisites to establishing proper jurisdictional grounds in such a claim for relief. The remand of the case by the Eighth Circuit back to the District Court was based simply on a statute of limitations question. It is on this basis that Petitioner has petitioned for a Writ of Certiorari and Church Respondents argue that a case which has been dismissed because of failure to meet subject matter jurisdictional grounds and untimely filing on statute of limitations grounds is not a case which is intended to be reviewed under the "special and important" language of Rule 17.

Petitioner's citation of 28 U.S.C. §1251(b)(2) is incorrect. This case does not now, nor has it ever embraced a

controversy between the United States and the State of Arkansas. Petitioner's reliance on the 44th Amendment to the Arkansas Constitution is totally unmerited. His disagreement with this law is totally irrelevant to his case, and Church Respondents respectfully request that this portion of his brief be stricken according to Supreme Court Rule 21.5 and 34.6.

Petitioner's reliance on 28 U.S.C. §1252 is also missplaced in that this case is not on appeal.

Church Respondents respectfully request that for the foregoing reasons the Court deny review on the Writ of Certiorari on jurisdictional grounds.

STATUTORY BASIS OF CASE

Petitioner Weston apparently based his action on 42 U.S.C. §§1983, 1985, and 1986. Since he failed to set out the statutes on which he has based his action they are included here.

"§1983. Civil Action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Contress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

"§1985. Conspiracy to interfere with civil rights."

[See Appendix, p. A-16]

"§1986. Action for neglect to prevent.

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in §1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefore, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued."

STATEMENT OF THE CASE

On October 22, 1980, Joseph Weston requested permission of the U.S. District Court, Eastern District of Arkansas, Northern Division, to file a complaint alleging violations of his civil rights *in forma pauperis*. On November 10, 1980, the Honorable Judge William Overton entered an order denying the petition. Petitioner Weston then filed his complaint with the requisite filing fee on May 15, 1981, alleging violations of his civil rights apparently pursuant to 42 U.S.C. §§1983, 1985, and 1986. Weston named in his complaint a number of persons, including judges, members of the Arkansas Supreme Court, the Attorney General of Arkansas, the Independence County prosecutor, Arkansas officials of the Church of Jesus Christ of Latter Day Saints, and the Church as well. The Church Respondents, namely R. Ford Wilkinson, Dr. Robert McChesney, Dr. J. Lynn Mellor, Richard W. Cobb, and The Little Rock, Arkansas Stake of the Church of Jesus Christ of Latter Day Saints (along with other defendants) filed motions to dismiss alleging lack of subject-matter jurisdiction. Weston had alleged that Church Respondents had conspired with various other defendants when they excommunicated him from the Mormon Church.

On September 30, 1981, the Honorable Judge William Overton granted defendants' various motions to dismiss, holding that Weston had failed to establish that his constitutional rights were violated, that Church Respondents were not even acting under color of state law, that some defendants were immune from suit, and that the complaint was barred by the statute of limitations.

On appeal July 7, 1982, the Eighth Circuit remanded the case on the issue of statute of limitations, directing the lower court to consider that Weston had filed a request in the District Court to proceed *in forma pauperis* before the statute of limitations had run; a copy of the complaint had been attached to the request. The District Court was

directed to consider whether Weston's *in forma pauperis* application had tolled the statute of limitations. In that opinion, the Eighth Circuit did not review the District Court's alternative holdings, but did retain jurisdiction to review them.

On remand, Judge Overton held on November 2, 1982, 1) that no Arkansas Savings Statute, found at *Ark. Stat. Ann.* §37-101 (1962) *et. seq.*, and particularly *Ark. Stat. Ann.* §37-222 (1962) applied to the circumstances of this case to save the case; 2) that under Arkansas law, the statute of limitations is not tolled by filing of a complaint and a motion to proceed *in forma pauperis;* and 3) that equitable considerations do not require the paid filing to be related back to the intial *in forma pauperis* filing for statute of limitations purposes.

Petitioner Weston appealed the District Court order and the Eighth Circuit affirmed on March 15, 1983.

Weston also petitioned for a rehearing which was denied by the Eighth Circuit on April 8, 1983.

Petitioner Weston filed a petition for Writ of Certiorari in this Court with accompanying brief on or about June 1, 1983.

This Brief is filed by Church Respondents in response to the Petition for Writ of Certiorari and Brief, and the Church Respondents contend that the Eighth Circuit properly affirmed the District Court ruling. The Church Respondents respectfully request that the petition for Writ of Certiorari be denied.

ARGUMENT

1. WHETHER THE DISTRICT COURT ERRED IN HOLDING a) THAT NO ARKANSAS SAVINGS STATUTE IS APPLICABLE TO PETITIONER WESTON'S ACTION IN THE CIRCUMSTANCES PRESENTED IN THIS CASE; b) THAT UNDER ARKANSAS LAW, THE STATUTE OF LIMITATIONS IS NOT TOLLED BY FILING OF A MOTION TO PROCEED *in forma pauperis;* and c) THAT EQUITABLE CONSIDERATIONS DO NOT REQUIRE THE PAID FILING TO BE RELATED BACK TO THE INITIAL *in forma pauperis* FILING FOR STATUTE OF LIMITATIONS PURPOSES.

Arkansas' Savings Statutes, found at *Ark. Stat. Ann.* §37-101 (1962) *et. seq.* are clearly not applicable to the facts and circumstances of the case. Each is very specifically applied to a set of circumstances; for example, *Ark. Stat. Ann.* §37-220 and 221 involve refiling of actions when plaintiff or defendant dies; §37-226 relates to persons with disabilities when the disability is removed; §37-227 and 228 deal with saving causes of actions of persons in the armed forces; §37-229 involves suits when the defendant leaves the county; and §37-231 involves suits by creditors. Petitioner attempted to rely on §27-222 (1962) which provides in pertinent part:

> "If any action shall be commenced within the time respectively prescribed in this act, and the plaintiff therein suffers a non-suit, or after a verdict for him the judgment be arrested, or after judgment for him the same be reversed on appeal or writ of error, such plaintiff may commence a new action one (1) year after such nonsuit suffered or judgment arrested or reversed . . . "

In a recent case in which the statute may have applied, the case was actually dismissed without prejudice for failure to prosecute. *Whittle v. Wiseman*, 683 F.2d 1128 (8th Cir. 1982).

Where there has been no nonsuit, no reversal on appeal, or arrest of judgment, the statute is not applicable. *Hill v. Pipkins*, 72 Ark. 549, 81 S.W. 1216 (1904). Here no nonsuit was ever granted. Petitioner simply filed a request to proceed *in forma pauperis* with complaint attached, and that request was denied. The complaint was properly commenced when Weston made his paid filing on May 15, 1981. Federal Rule of Civil Procedure 3. In order to toll the statute of limitations, the action must be properly commenced. *Wilkins v. Worthen*, 62 Ark. 401, 36 S.W. 21 (1896); *Erwin v. Arkansas Louisiana Gas Co.*, 261 Ark. 537, 550 S.W.2d 174 (1975).

The issue of whether the statute of limitations is tolled by the filing of a motion to proceed *in forma pauperis* or whether equitable considerations require the paid filing to relate back to the initial *in forma pauperis* filing for statute of limitations purposes was one of first impression in the Arkansas Courts. A few other jurisdictions have addressed the issue, and Judge Overton thoroughly reviewed the cases in his opinion of November 2, 1982.

In several of the cases cited, petitioners were prisoners who filed *in forma pauperis* petitions which the court either granted, or found at least to be filed in good faith. *Gardner v. King*, 464 F. Supp. 666 (W.D.N.C. 1979); *Vinson v. Richmond Police Department*, 567 F.2d 263 (4th Cir. 1977); *Move Organization v. City of Philadelphia*, 530 F. Supp. 764 (E.D. Pa. 1982).

Factually, this is simply not a case in which flexibility should be applied. In *Gardner v. King*, supra in which the court did hold that receipt of the *in forma pauperis* motion was sufficient to commence the action so as to toll the statute of limitations, the plaintiff was a prisoner who acted in good faith in filing his motion, and when it was denied, acted promptly to continue prosecution of his case.

In the case at bar, Petitioner Weston has approximately $12,000 per year in untaxed income, and

owns a home and 80 acres of land. He waited 6 months before making a paid filing after his motion was dismissed.

II. WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT WESTON FAILED TO ALLEGE THAT HIS CONSTITUTIONAL RIGHTS WERE VIOLATED WITH RESPECT TO CHURCH RESPONDENTS.

Petitioner Weston has failed to make allegations against Church Respondents which satisfy jurisdictional requirements under 42 U.S.C. §§1983, 1985(2) & (3), and 1986. As Judge Overton stated in his opinion of September 30, 1981, Petitioner must establish 1) that he has a right which is protected by federal law or by the constitution of the United States; and 2) that defendants deprived him of that constitutional right while acting under color of state law. Because of the fundamental separation of church and state, ecclesiastical matters are handled by church tribunals, and legal tribunals must accept such decisions as final and binding on them. *First Presbyterian Church of Schenectady v. United Presbyterian Church in U.S.*, 430 F. Supp. 450 (D.C.N.Y. 1977). Expulsion of a church member is considered a matter of church discipline and church discipline is a matter which does not concern the civil courts. *Parker v. Harper*, 295 Ky. 686, 175 S.W.2d 361 (Ct. App. 1943); *Briscoe v. Williams*, 192 S.W.2d 643 (Mo. Ct. App. 1946); *Hughes v. Killing*, 198 S.W.2d 779 (Tex. Ct. Civ. App. 1946). Some cases have held that civil courts have no jurisdiction to review an act of expulsion. *Briscoe v. Williams*, supra; *Stewart v. Jarrill*, 206 Ga. 855, 59 S.E.2d 368 (1950). When a person becomes a member of a church, he does so voluntarily and he does so on condition of submission to the church's ecclesiastical jurisdiction, no matter how dissatisfied he is with the exercise of that jurisdiction. *Id*, at 370.

Church Respondents are unable to address the "ecclesiastical case of Mrs. Johnson (p. 51 in Courtran 7/17/82)" referred to in Petitioner's Brief because Church

Respondents are unfamiliar with this case, and Petitioner has failed to provide adequate facts or law supporting his contention.

Church Respondents make no attempt to discuss the various aspects of immunity which relate to other respondents in this case.

CONCLUSION

In conclusion, Church Respondents respectfully request that Petitioner's Petition for Writ of Certiorari be denied. For the foregoing reasons this is simply not a case in which special and important reasons exist to grant the petition. Rule 17, Supreme Court Rules.

In summary, Petitioner totally failed to establish jurisdictional grounds under 42 U.S.C. §§1983, 1985(2) & (3), and 1986 with respect to Church Respondents; he failed to meet statute of limitations requirements; and he has been unable to establish a special and important reason to grant his Petition for Writ of Certiorari under Rule 17 of the Supreme Court Rules.

In addition, Petitioner's Brief is burdensome and irrelevant, and does nothing to concisely state the issues or discuss them beyond raising numerous irrelevant questions. Church Respondents respectfully request that Petitioner's Writ of Certiorari be denied on the basis of Supreme Court Rule 21.5 which permits such briefs to be denied solely on that basis.

Respectfully submitted

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JOSEPH H. WESTON — PLAINTIFF

VS. — NO. LR M 380

ANN BAUGHMAN (BACHMAN), NANCY BROKAW, JEAN HILL, JACKIE HALL, JOHN NORMAN HARKEY, CIRCUIT JUDGE ANDREW G. PONDER, CIRCUIT JUDGE LEROY BLANKENSHIP, CIRCUIT JUDGE H.A. TAYLOR, CHANCELLOR ROBERT DUDLEY, VEDA M. GORDON, R. FORD WILKINSON, DR. J. LYNN MELLOR, DR. ROBERT MCCHESNEY, INDEPENDENCE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF ARKANSAS, HONORABLE STEVE CLARK, ATTORNEY GENERAL OF ARKANSAS, AS RESPONDENT FOR ARKANSAS OFFICIALS — DEFENDANTS

ORDER

Joseph H. Weston has filed with the Court a "request for Permission to File En Pauperis" which the Court interprets as a pro se petition to proceed in forma pauperis under 28 U.S.C. §1915(a). From the face of the petition and its reverse side where Mr. Weston has made a number of calculations, it appears that petitioner's family has a tax free monthly income of just over $1,000. He also indicates that he owns a home and eighty acres which he values at $39,000.

Under these circumstances, the Court finds that petitioner is not a pauper and the petition will be denied.

Petitioner may file his complaint on payment of the appropriate fees.

It is so ordered this November 10, 1980.

/s/ William R. Overton
UNITED STATES DISTRICT JUDGE

Filed Nov. 10, 1980

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

JOSEPH H. WESTON PLAINTIFF

VS. NO. B C 81-45

ANN BACHMAN, ET AL. DEFENDANTS

ORDER

Pending before the Court are several motions to dismiss and an amended motion to dismiss. In each motion, the defendants allege that the Court lacks subject matter jurisdiction and that the plaintiff has failed to state a claim upon which relief can be granted or that the statute of limitations bars this action. Each of the points of the defendants is well taken by the Court.

There are two facts necessary to satisfactorily meet the jurisdictional requirements or to state a claim for relief under 42 U.S.C. §1983, §1985 and §1986. First, plaintiff must establish that he has a right which is protected by federal law or by the Constitution of the United States. Second, he must establish that each defendant deprived him of that constitutional right while acting under color of state law. Plaintiff's second amended complaint sets out six specific instances in which he alleges that his constitutional rights

were violated. In one instance, he challenges the right of Ann Bachman, Nancy Brokaw, Jackie Hall, Jean Hill and their lawyer, John Harkey, to bring a state court libel action against him. In another instance, plaintiff challenges the actions of the Little Rock, Arkansas Stake of the Church of Jesus Christ of the Latter Day Saints and its officials, Lynn Mellor, Dr. Robert McChesney, Richard Cobb and Ford Wilkinson in excommunicating him from the church about the same time as a 1977 Independence County grand jury indictment against him. In yet another instance, plaintiff challenges the actions of Judge H.A. Taylor in ordering the plaintiff to answer interrogatories and to deliver himself up for the taking of his deposition in a case which was pending in Judge Taylor's court. Plaintiff also challenges the decision of the justices of the Arkansas Supreme Court denying him relief from a 1977 Independence County grand jury indictment. Plaintiff challenges the authority of Judge Robert Dudley to hold him in contempt of court for plaintiff's refusal to testify before the Independence County grand jury. Plaintiff also challenges his 1977 Independence County grand jury indictment which was subsequently quashed and attacks Judge Andrew Ponder, Prosecutor Leroy Blankenship and Foreperson Vera Gordon for their participation in the indictment procedure. Finally, plaintiff names the State of Arkansas, Independence County and Jim Pearson as defendants without making specific allegations as to how they violated his constitutional rights. None of these facts establishes that plaintiff's constitutional rights were violated. Defendants Bachman, Brokaw, Hall, Hill, Harkey, Mellor, McChesney, Wilkinson, Pearson and the Church of the Latter Day Saints were not even acting under color of state law. Furthermore, defendants Mays, Stroud, Byrd, Purtle, Smith, Holt, Hickman, Dudley, Matthews, Wootton, Ponder and Taylor have absolute judicial immunity from damage suits, *Stump v. Sparkman*, 435 U.S. 249 (1978); defendant Blankenship was acting within the scope of his duties as prosecuting attorney when he allegedly violated plaintiff's constitutional rights and is, therefore, absolutely immune from suit, *Imbler v.*

Pachtman, 424 U.S. 409 (1976); the State of Arkansas, which did not consent to this present action by the plaintiff, is also immune from suit brought by one of its citizens under the Eleventh Amendment. *Employees v. Missouri Public Health*, 411 U.S. 279 (1973).

Plaintiff's complaint is also barred by the applicable statute of limitations. The statute of limitations for a §1983 suit which is brought in the state of Arkansas is three years. *Reed v. Hutto*, 486 F.2d 534 (8th Cir. 1973). The conduct of which plaintiff complains stems from a grand jury indictment against him on November 19, 1977. Therefore, plaintiff's filing of this action on May 15, 1981, is not timely.

The motions to dismiss by each of the defendants are granted.

Dated this September 30, 1981.

/s/ William R. Overton
UNITED STATES DISTRICT JUDGE

Filed Sept. 30, 1981

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-2112

Joseph H. Weston,	*	
	*	
Appellant,	*	
	*	Appeal from the United
v.	*	States District Court
	*	for the Eastern District
Ann Bachman; Nancy Brokaw; Jean Hall; Jackie Hall; John Norman	*	of Arkansas.
	*	

Harkey; Circuit Judge Andrew G. Ponder; Leroy Blankenship, Attorney; Circuit Judge H.A. Taylor; Robert Dudley, Associate Justice of Arkansas Supreme Court; Veda M. Gordon, Foreman of Grand Jury; R. Ford Wilkinson; Dr. Robert McChesney; Dr. J. Lynn Mellor; Independence County; Attorney General Steve Clark, as respondent to suits against Arkansas; Conley Byrd; George Smith; Frank Holt; Darrell Hickman; Stephen A. Matthews; Richard H. Wootton; Richard A. Cobb; State of Arkansas; Little Rock, Arkansas, Stake of Church of Jesus Christ of Latter-day Saints; John I. Purtle; Richard Mays; and John Stroud,

Appellees.

Submitted: June 14, 1982

Filed: July 7, 1982

Before HEANEY and ROSS, Circuit Judges, and STEVENS,* District Judge.

HEANEY, Circuit Judge.

Joseph H. Weston appeals from a district court order granting the defendants' motions to dismiss his civil rights

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*The HONORABLE JOSEPH E. STEVENS, JR., United States District Judge, United States District Court for the Western District of Missouri, sitting by designation.

action brought under 42 U.S.C. §§1983, 1985 and 1986. The district court [1] held that the plaintiff failed to establish that his constitutional rights were violated, that certain defendants were not acting under color of state law, that certain defendants were immune from suit and, finally, that the complaint was barred by the applicable statute of limitations. We remand for further proceedings consistent with this opinion.

Section 1983 does not contain its own statute of limitations. Therefore, in determining the proper limitations period in a section 1983 action, the state statute governing actions most analogous to the civil rights claim is applied. *Carmon v. Foust*, 668 F.2d 400, 402-403 (8th Cir. 1982). The district court correctly determined that Weston's complaint was subject to the three-year limitations period provided by Ark. Stat. Ann. §37-206. *See Clark v. Mann*, 562 F.2d 1104, 1111-1112 (8th Cir. 1977).

Weston filed a request in the district court to proceed *in forma pauperis* on October 22, 1980. A copy of the complaint was attached to the request. The district court denied the request on November 10, 1980. Thereafter, Weston paid the filing fee and refiled his complaint on May 15, 1981. The complaint alleged, in essence, that the defendants conspired against Weston in retaliation for derogatory remarks about Independence County Circuit Judge Andrew Ponder and Leroy Blankenship, a former prosecutor for Independence County, during their campaigns for circuit court judgeships in 1977. Weston contended that conspiracy was effectuated through the misuse of a grand jury to indict him, libel suits against him and his excommunication from the Mormon Church.

1
The Honorable William F. Overton, United States District Court Judge for the Eastern District of Arkansas.

The district court determined that the plaintiff's cause of action accrued on November 19, 1977, when he was indicted by an Independence County grand jury. Accordingly, it held that Weston's complaint, filed on May 15, 1981, was barred by Arkansas's three-year statute of limitations which ran on November 19, 1980. The issue before this Court is whether Weston satisfied the statute of limitations by filing within the limitations period on October 22, 1980, his complaint and motion to proceed *in forma pauperis*.

This Court recently held in *Whittle v. Wiseman*, No. 81-1935 at 2 (8th Cir. Apr. 16, 1982), that "in applying [Ark. Stat. Ann.] §37-206 to civil rights actions, we recognize decisions of the Arkansas Supreme Court regarding the applicability of the saving statute to claims subject to the three-year limitation as we have in contexts other than civil rights litigation." In *Whittle*, the plaintiff commenced an action under 42 U.S.C. §1983, within the three-year statute of limitations. *Id.* at 1-2. The action was subsequently dismissed for failure to prosecute. *Id.* The plaintiff then refiled her suit after the limitations period had run, contending that it was "saved" by Ark. Stat. Ann. §37-222, which provides that if an action is initiated within the statutory time limit and is dismissed without prejudice, the plaintiff may commence a new action within one year of the dismissal. *Id.* at 2. This Court remanded the matter to the district court to determine whether Ark. Stat. Ann. §37-222 "saved" the plaintiffs' section 1983 claim. *Id.* at 2-3.

The district court here did not address the question of whether Weston's *in forma pauperis* application tolled the statute of limitations. Moreover, it issued its order prior to our disposition of *Whittle v. Wiseman, supra*. Accordingly, it is appropriate to remand this matter to the district court to determine whether Ark. Stat. Ann. §37-222, or any of the other Arkansas savings statutes, Ark. Stat. Ann. §37-101 *et seq.*, are applicable to plaintiff's action in the circumstances presented in this case. Apart from any interpretation of the

Arkansas saving statutes, the district court also should determine whether, under Arkansas law, the statute of limitations is tolled by filing a complaint and a motion to proceed *in forma pauperis* or whether equitable considerations require the paid filing to be related back to the initial *in forma pauperis* filing for statute of limitations purposes.

We need not at this time review the district court's alternative holdings that the plaintiff failed to establish that his constitutional rights were violated, that certain defendants were not acting under color of state law and that certain defendants were immune from suit. We retain jurisdiction over these issues and, if necessary, we will review them along with any remaining statute of limitations questions if an appeal is taken from the district court's judgment on remand. Therefore, we vacate the district court's judgment concerning the statute of limitations, and remand for proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

JOSEPH H. WESTON PLAINTIFF

VS. NO. B C 81 45

ANN BACHMAN, ET AL. DEFENDANTS

ORDER

On September 30, 1981, this Court dismissed plaintiff's civil rights action brought under 42 U.S.C. §§1983, 1985 and

1986. This Court found, among other things, that the complaint was barred by the applicable statute of limitation. Plaintiff's cause of action accrued on November 19, 1977, when he was indicted by an Independence County grand jury. Accordingly, this Court held that plaintiff's complaint, filed May 15, 1981, was barred by Arkansas' three year statute of limitation which ran on November 19, 1980. This Court did not take into consideration that plaintiff had filed a petition to proceed *in forma pauperis* and a complaint on October 22, 1980, which was denied on November 10, 1980. This cause of action is now before the Court on remand from the Eighth Circuit Court of Appeals for determination of the following issues: (1) whether Ark. Stat. Ann. §37-222 or any other Arkansas savings statute, Ark. Stat. Ann. §37-101, *et seq.*, is applicable to plaintiff's action in the circumstances presented in this case; (2) whether, under Arkansas law, the statute of limitations is tolled by filing of a complaint and a motion to proceed *in forma pauperis;* or (3) whether equitable considerations require the paid filing to be related back to the initial *in forma pauperis* filing for statute of limitation purposes.

Arkansas has the following savings statutes:

> Ark. Stat. Ann. 37-220, which allows a plaintiff to refile a cause of action against a defendant within one year of his death or the appointment of a representative for his estate if the cause of action survives the deceased.
>
> Ark. Stat. Ann. §37-221, which allows the representative of the estate of deceased plaintiff to refile an abated action within one year of plaintiff's death, if the action survives the plaintiff.
>
> Ark. Stat. Ann. §37-222, which allows a plaintiff who has been granted nonsuit without prejudice, or whose judgment has been arrested or reversed to commence a

new action within one year of the nonsuit, arrest or reversal of judgment. [1]

Ark. Stat. Ann. §37-226, which permits persons with disabilities, i.e., infants, the insane and those imprisoned out of state, to bring causes of action which accrued during their disability within three years after their disability has been removed or dissipated.

Ark. Stat. Ann. §37-227, which permits persons in the armed forces to bring cause of action which accrued while our country was engaged in war within six months of the end of the war.

Ark. Stat. Ann. §37-228, which permits persons in the armed forces when our country is at war to bring action for the collection of debts or the recovery of real or personal property within a year and six months of the end of the war, provided that the statute of limitations on these causes of action had not run prior to that person's entry into the armed forces.

Ark. Stat. Ann. §37-229, which tolls the running of the statute of limitations in cases where an action is prevented by some action of the defendant or by his leaving the country.

Ark. Stat. Ann. §37-231, which tolls the running of the statute of limitations in suits by creditors against debtors, who leave the state without the creditors' knowledge, until the creditor becomes appraised of the absconder's whereabouts.

None of these statutes apply to the present case.

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It should be noted that in November, 1977, Mr. Weston brought a §1983 against John Norman Harkey, who is also a defendant in this lawsuit, alleging that Mr. Harkey sent him threatening correspondence. This suit was dismissed without prejudice in September, 1978. The Court does not believe that Mr. Weston's §1983 action against Mr. Harkey is related to the present action. But if there was a connection, Mr. Weston does not come within the purview of Ark. Stat. Ann. §37-222 because this suit was not filed until 2½ years after the 1977 case was dismissed.

The Arkansas courts have not decided the issue of whether the statute of limitations is tolled by the filing and motion to proceed *in forma pauperis* or whether equitable considerations require the paid filing to relate back to the initial *in forma pauperis* filing for statute of limitations purposes. However, a few federal courts have been confronted with those issues and similar issues. Each decision has centered on whether courts should apply literally Rule 3 of the Federal Rules of Civil Procedure, which states that "an action is commenced by filing a complaint in court," or their local rules on commencement of actions. In each case, the courts found that equitable considerations or sound reason compelled them not to adopt a rigid interpretation of the rules on commencement of actions. For instance, in *Gardner v. King*, 464 F. Supp. 666 (W.D.N.C. 1979), the Court held that the receipt of a §1983 complaint and an affidavit in support of *in forma pauperis* status of a *pro se* prisoner was sufficient to "commence" action, so as to toll the statute of limitations, notwithstanding its denial of *in forma pauperis* status. It reasoned that Rule 3 should not be literally applied when extraordinary circumstances exist which justify judicial flexibility. It cited plaintiff's status as a prisoner and a *pro se* applicant and the fact that plaintiff's suit was brought to vindicate important federal principles under statutes that are unequivocably remedial in nature as special considerations which warranted solicitous treatment of plaintiff's case. The Court also conditioned its holding on plaintiff's initial filing, being in good faith, not interposed for dilatory purposes, based on the reasonable expectation that *in forma pauperis* status would be granted and followed by prompt action to continue prosecution of the action after *in forma pauperis* status was denied. It concluded that plaintiff's payment of the requisite filing fee a little over a month after the denial of his *in forma pauperis* status related back to the initial filing of his initial affidavit.

The decision in *Gardner* closely tracks earlier federal cases involving similar issues. In *Mathias v. United States*, 391 F.2d 938, 183 Ct. Cl. 145, *vacated on rehearing on other grounds*, 394 F.2d 519, 190 Ct. Cl. 925 (4th Cir. 1974),

the Court of Claims was faced with the question of whether its local rules, which required that copies be attached to petitions before filing, should be applied literally to a *pro se* inmate seeking to be compensated for an allegedly illegal discharge from the military. The Court found that plaintiff's status as a *pro se* applicant and as a prisoner merited the treatment of his initial petition as the commencement on the action even though his subsequent petition, which complied with court rules, was time barred. The United States Court of Appeals for the Fourth Circuit took a comparable stance in *Vinson v. Richmond Police Department*, 567 F.2d 263, 264 n.2 (4th Cir. 1977). In that case, the plaintiff filed his §1983 complaint and petition to proceed *in forma pauperis* within the applicable statute of limitations; however, the Court did not enter an order granting plaintiff's petition until after the statute of limitations had run. The Court of Appeals stated that it could not accept the district judge's dismissal of the action on statute of limitation grounds. It found that the more reasonable manner of handling the situation would be to have the approval of application to proceed *in forma pauperis* relate back to the date when plaintiff filed his complaint and application to proceed *in forma pauperis*.

The facts of the present case do not warrant the Court's exercise of judicial flexibility. Although plaintiff was a *pro se* applicant for *in forma pauperis* status, and brought suit under a federal statute which is remedial in nature, he neither exercised good faith in filing his affidavit in support of *in forma pauperis* status, nor did he act promptly in refiling his action after *in forma pauperis* status was denied. *Gardner, supra.* Plaintiff could not have reasonably expected the Court to declare him a pauper when he was receiving $12,000 a year in tax free income and owned a home and eighty acres of land which he valued at $39,000. Furthermore, plaintiff delayed six months after the Court denied his petition to proceed *in forma pauperis* before he refiled his complaint. Under these circumstances, plaintiff's May 15, 1981, complaint should not be allowed to

relate back to the *in forma pauperis* petition of October 22, 1980.

Dated this November 2, 1982.

/s/ William R. Overton
UNITED STATES DISTRICT JUDGE

Filed 11-3-82

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 81-2112 & 82-2433

Joseph H. Weston,	*	
	*	
Appellant,	*	
	*	Appeal from the United
v.	*	States District Court
	*	for the Eastern District
Ann Bachman; Nancy Brokaw; Jean	*	of Missouri.
Hall; Jackie Hall; John Norman	*	
Harkey; Circuit Judge Andrew G.	*	
Ponder; Leroy Blankenship,	*	
Attorney; Circuit Judge H.A.	*	
Taylor; Robert Dudley, Associate	*	
Justice of Arkansas Supreme Court;	*	
Veda M. Gordon, Foreman of Grand	*	
Jury; R. Ford Wilkinson; Dr.	*	
Robert McChesney; Dr. J. Lynn	*	
Mellor; Independence County;	*	
Attorney General Steve Clark, as	*	
respondent to suits against	*	
Arkansas; Conley Byrd; George	*	
Smith; Frank Holt; Darrell	*	
Hickman; Stephen A. Matthews;	*	

Richard H. Wootton; Richard A. Cobb; State of Arkansas; Little Rock, Arkansas, Stake of Church of Jesus Christ of Latter-day Saints; John I. Purtle; Richard Mays; and John Stroud,

Appellees.

Submitted: June 14, 1982

Filed: March 15, 1983

Before HEANEY and ROSS, Circuit Judges, and STEVENS,* District Judge.

ORDER

This matter is before the Court for a second time. When it was first here, we remanded the matter to the district court with directions to it to reconsider whether the statute of limitations had been tolled. We retained jurisdiction of the matter.

The district court has now considered the matter and has held

> 1) no Ark. Savings Statute, found at *Ark. Stat. Ann.* §37-101 (1962) *et seq.*, and particularly *Ark. Stat. Ann.* §37-222 (1962) applied to the circumstances of this case to save the case; 2) that under Arkansas law, the statute of limitations is not tolled by filing of a complaint and a motion to proceed *in forma pauperis;* and 3) that equitable considerations do not require the paid filing to be related back to the initial *in forma pauperis* filing for statute of limitations purposes.

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*The HONORABLE JOSEPH E. STEVENS, JR., United States District Judge, United States District Court for the Western District of Missouri, sitting by designation.

The judgment of the district court is affirmed on the basis of its well-reasoned opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 81-2112 and 82-2433	September Term 1982
Joseph H. Weston,	
Appellant,	
vs.	Appeals from the United States District Court for the Eastern District of Arkansas
Ann Bachman; Nancy Brokaw; Jean Hill; Jackie Hall; John Norman Harkey; et al,	
Appellees.	

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

April 8, 1983

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 81-2112 and 82-2433 September Term, 1982

Joseph H. Weston,
Appellant,

vs.

Ann Bachman, et al.,
Appellees.

Appeals from the United States District Court for the Eastern District of Arkansas.

It is now here ordered by the Court that appellees' motion for costs under Eighth Circuit Rule 16(e) against appellant is denied.

And it is further ordered that appellant's motion to stay mandate pending petition for writ of certiorari is denied.

May 3, 1983

CIVIL RIGHTS

§1985. Conspiracy to interfere with civil rights

Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any offfice, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of

the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any state or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat,

any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

R.S. §1980.